Filed 1/4/19 In re C.B. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re C.B., a Person Coming Under the Juvenile Court Law. LAKE COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. J.B., Defendant and Appellant.	A153370 Lake County Super. Ct. No. JV320477B

J.B. (Father) appeals the denial of his Welfare and Institutions Code section 388 petition in which he sought to change the juvenile court's order bypassing reunification services between Father and C.B. (Minor).[1] Father also appeals the juvenile court's decision, at the section 366.26 hearing (.26 hearing), to terminate parental rights and make adoption the permanent plan for Minor. Father contends the juvenile court should have applied either the beneficial relationship exception or the sibling relationship exception to adoption. (§ 366.26, subds. (c)(1)(B)(i), (c)(1)(B)(v).) We disagree and affirm.

[1] All undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

Detention, Jurisdiction, and Disposition

On February 27, 2017, the Lake County Department of Social Services (Department) filed a section 300 petition on behalf of Minor, who was 21 months old at the time. As amended, the petition alleged S.A. (Mother) was unable to adequately protect or care for Minor because of untreated substance abuse issues, lack of appropriate housing, and Mother left Minor with D.S., an unsuitable caretaker.[2] (§ 300, subds. (b), (g).) Father also failed to protect Minor. (§ 300, subds. (b), (g).) Father was detained in the Lake County jail in August 2016, and he did not make arrangements for the care and custody of Minor during his incarceration or since his release.

On March 2, 2017, the juvenile court held a detention hearing, detained Minor, and set a jurisdiction hearing. Minor was placed in foster care in the same home as his half-sibling, J.S.

The Department's jurisdiction report stated that Father "was participating in inpatient drug treatment at the Ukiah Recovery Center," and would be doing so "until May at which time he will go to a sober living facility." The Department attached to its report a copy of Father's "BioPsychoSocial Assessment for entry to Lake County Veteran's Treatment Court," which outlined Father's long history of drug use and arrests upon discharge from the army. At the jurisdiction hearing, on July 24, 2017, the juvenile court found the amended allegations to be true, sustained the amended petition, and set a date for Minor's disposition hearing.

In its disposition report, the Department recommended denial of reunification services for Father based on his extensive criminal record, his participation in multiple

[2] Mother and D.S. are not parties to this proceeding and are mentioned only when necessary. The record here is the same one relied upon by the parties in two other appeals and one writ proceeding. On October 1, 2018, in consolidated appeals, we affirmed the juvenile court's denial of D.S.'s request for presumed parent status. (*Lake County Dept. of Social Services v. D.S.* (Oct. 1, 2018, A152062, A152992 [nonpub. opn.].) On November 22, 2017, we denied Father's writ petition. (*J.B. v. Lake County Superior Court* (Nov. 22, 2017, A152453 [nonpub. opn.].)

drug treatment programs, and his long history of unsuccessful attempts to treat his substance abuse problems. The report indicated Father was currently in a residential program, but continued "to struggle with his sobriety. This is evident by his recent relapse and re-admittance into Ukiah Recovery Center in June 2017" after taking pills while at Hearn House, a rehabilitation center in Santa Rosa. The report noted Father "has had multiple opportunities to treat this substance abuse disorder, yet [Father] has reported abusing substances as recently as 2 months ago, with the most chronic use being reported in May 2016, [when] by his own admission he was using heroin on a daily basis."

Father submitted a brief challenging the Department's recommendation. Father pointed out the Department provided "no evidence of . . . regular use of illicit substances since May 2016." He argued his self-admission to taking two pain pills in June 2017 was "a relapse rather than resistance to treatment." Father indicated he "now has over a year of sobriety, with one brief relapse." Father was working "immensely hard to overcome his substance abuse history and maintain his relationship with his son." Visits between Father and Minor were at first difficult, but now "begin and end with hugs."

The Department filed a supplemental report, describing the visits between Father and Minor from March to July 2017, noting the visits had not been consistent, Father had "a long way to go" in his recovery efforts, and "the child welfare timeline does not fit in that timeframe."

At the disposition hearing on September 13 and 14, 2017, a number of witnesses testified in support of Father's request for reunification services. A Veterans Administration (VA) social worker testified Father had "been in compliance throughout with the Veterans Treatment Court," and Father would receive help with housing after treatment at the Ukiah Recovery Center. The social worker testified Father "never had a child to take care of until this child was born," and Father was "ready to make . . . changes," but the social worker acknowledged "there's always going to be concerns" about his ability to remain in recovery. A deputy probation officer testified Father had "done a great job" since being admitted to the Veterans Treatment Court in February 2017, and Father was motivated to succeed because he wanted "to be a role

model for his child." There was testimony that visits between Father and Minor were going "as good as could be expected."

Father was 50 years old, and he was participating in a drug treatment program at the Ukiah Recovery Center, where he completed anger management and parenting classes. Father also completed life skills classes. Father admitted he started using heroin again in January or February of 2016. Father participated in multiple drug treatment programs, but he claimed this time was different because he had a two-year-old son who needed him.

Father acknowledged he took two nonprescribed Vicodin pills in June 2017, was taken to hospital in an ambulance, and had to leave Hearn House. However, Father returned immediately to the Ukiah Recovery Center, and he had not tested positive for drug use since he left jail in February 2017. Father described his visits with Minor as emotional because Minor was fourteen months old when Father went to jail, and he missed six months of Minor's development.

Based on this testimony, the evidence before it, and the arguments of counsel, the juvenile court denied reunification services for Father. The juvenile court was sympathetic to Father's situation, but found clear and convincing evidence Father was resistant to drug treatment in the three years before the petition was filed. The juvenile court noted Father had "been in and out of recovery, an ongoing addiction to heroin and use of heroin through when he was arrested—after his child's birth when he was arrested in August of 2016." The juvenile court found Father's incident involving two Vicodin pills was "more than just a little relapse," because the situation "was serious enough that they called an ambulance." The juvenile court observed that, when given more freedom, Father had "a constant cycle" and a "long history" of "relapsing from time to time."

Addressing the Minor's best interests, the juvenile court found Father's current efforts were good, but he had a "severe history," and an inability to overcome his drug problem "after 30 years of various attempts, different programs." Based on Minor's need for stability, and the "extremely tenuous" nature of Father's situation, the juvenile court denied reunification services, and set a .26 hearing. On October 30, 2017, Father

petitioned this court for extraordinary writ relief, and, on November 22, 2017, we denied Father's writ petition. (*J.B. v. Lake County Superior Court* (Nov. 22, 2017, A152453) [nonpub. opn.].)

Request to Change Court Order

On November 16, 2017, Father requested the juvenile court to change its order bypassing reunification services. Father pointed out he "graduated from a 90 day treatment program at Ukiah Recovery Center and entered an additional 90 day program at Hilltop Recovery Center. [¶] . . . [¶] Father continues to maintain sobriety and focus on his recovery and treatment." Father's VA social worker indicated Father was in full compliance with the Veteran's Treatment Court, confirmed his graduation from the Ukiah Recovery Center, and stated that, upon his graduation from Hilltop Recovery Center, Father planned "to move into the home of close friends who maintain a sober lifestyle." Father argued it would be in Minor's best interest for "Father [to] be considered as a viable permanency option for him."

The juvenile court scheduled a prima facie hearing on Father's request. The Department filed a response.[3] After a number of continuances, on January 4, 2018, the juvenile court denied Father's request to change its order denying reunification services. On the same date, the court terminated parental rights and made adoption the permanent plan for Minor. Father timely appeals.

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[3] On March 1, 2018, in *Lake County Dept. of Social Services v. D.S.*, Case No. A152992, the clerk's transcript that contains this document, and others relied upon by the parties, was ordered stricken. Pursuant to California Rules of Court, rules 8.155(a), 8.410(b), and 8.416(d), on this court's own motion, we augment the record to include the following documents: (1) the Department's response to Father's section 388 petition; (2) the minute order dated December 11, 2017; (3) the Department's .26 report; (4) the minute order dated January 4, 2018; (5) the juvenile court's order after hearing on the section 388 petition; (6) the juvenile court's order after the .26 hearing; and (7) Father's notice of appeal. The parties also rely on stricken reporter's transcripts, so we augment the record to include the transcripts of the December 11, 2017 and January 4, 2018 hearings.

DISCUSSION

Father contends the juvenile court erred by denying his request to change its order denying reunification services and by refusing to apply either the sibling exception or the beneficial relationship exception to adoption. We disagree and affirm.

I.

No Abuse of Discretion in Denying Father's Section 388 Petition

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Up until the time the .26 hearing is set, " 'the parent's interest in reunification is given precedence over a child's need for stability and permanency.' [Citation.] 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] 'The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue.' " (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.) We will not reverse a denial of a section 388 petition " 'unless an abuse of discretion is clearly established.' [Citation.] The denial of a section 388 motion rarely merits reversal as an abuse of discretion. [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685–686.)

Here, Father's evidence of changed circumstances consisted of information establishing: he "graduated from a 90-day treatment program at Ukiah Recovery Center"; "[h]e had engaged in an additional 90-day program at the Hilltop Recovery Center"; and "he continued to maintain his sobriety and to focus on his recovery and treatment." In addition, a VA social worker indicated Father was in "full compliance" with the Lake County Veterans Treatment Court program and had arranged for housing with friends who maintain a sober lifestyle. At the December 11, 2017 hearing on Father's petition, the court admitted into evidence Father's certificate of completion of a "Nurturing Fathers" program, a letter from Hilltop Recovery Services indicating Father

was soon expected to successfully discharge, information regarding a proposed preschool for Minor, and photographs of the home where Father planned to live.

Counsel for Father argued Father was doing extremely well in his treatment, Father had housing, and it would be in Minor's best interests not to rule Father out as a permanent placement for Minor. The Department responded there was not a change in circumstances because Father had an extensive history of drug abuse, periods of sobriety, and then major relapses. Counsel for the Minor argued he was in favor of services for Father at the disposition hearing, but now, focusing on Minor's need for permanency, he could no longer support the request. The court continued the hearing on Father's request.

On January 4, 2018, the court denied Father's section 388 petition. The court stated the circumstances were not "exactly the same" as when the court denied reunification services for Father, but "similar circumstances" existed. The court noted that over a 21-year period, Father had experienced substance abuse issues, entered treatment for a period of time, and then relapsed on multiple occasions. The court found Father's visits with Minor did not indicate a strong bond. The court concluded Father's circumstances were "changing, not changed . . . ." Addressing Father, the court stated, "you are having a battle with substance abuse. And it's clear to me that, at least here recently, you've been trying hard. And I give you credit for that. As I . . . said earlier, the focus here is on permanence and stability for [Minor]. And I hope that you continue along the course you've charted here most recently."

We discern no abuse of discretion in the court's denial of Father's section 388 petition. Here, the VA's August 2016 biopsychosocial assessment stated Father began using methamphetamine upon his discharge from the army in 1996. After spending six years in prison, Father "went into substance abuse treatment at CenterPoint in San Rafael. He did 90 days there but then relapsed on Christmas Eve of 2003 and went back to prison for 1 year. Upon release he went to Turning Point residential treatment in Santa Rosa. He . . . had 2 years of sobriety and was doing quite well. . . . After another relapse and return to prison he was released and went to Henry Ohlohaff House residential rehab in Novato. [Father] . . . was again doing well and had a job with GM for about 9 months

until another relapse in 2006. He returned to prison and during this time he was introduced to heroin[], which became his drug of choice. At this point the VA got involved in [Father's] recovery and re-entry. He went into the Homeless Veterans Rehabilitation Program at the Palo Alto VA. He did very well in the program and even worked for the VA in the compensated work therapy program. He had 1 year of sobriety before relapsing. He got off parole in 2009 but was again arrested in 2010 for residential burglary. He went back to prison and paroled out in 2012. Since 2012 he continues to have problems with absconding violations and not fulfilling the requirements of parole. [Father] reports he continued to use heroin[] daily up until about 3 months ago."

Given Father's long history of seeking treatment for his substance abuse problems, but then relapsing on multiple occasions, Father demonstrated, at best, that his circumstances were changing, not changed. Numerous cases support the juvenile court's conclusion. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [no changed circumstances where mother had "a history of drug relapses, [was] in the early stages of recovery, and [was] still addressing a chronic substance abuse problem"]; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641–642 [participation in 12-step meetings insufficient evidence of changed circumstances because father already received extensive treatment for alcoholism but relapsed]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [seven months of sobriety after long history of drug use did not demonstrate changed circumstances]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [denial of section 388 petition proper where the mother's "circumstances were changing, rather than changed"].) Father failed to establish changed circumstances, so it was reasonable for the court to deny his section 388 petition.

Furthermore, it was reasonable for the court to conclude that reunification services for Father would not promote Minor's best interests. Minor was only 21 months old when the dependency petition was filed. Father had not spent much time with Minor because of his incarceration and rehabilitation. There was evidence Minor was content and comfortable in the home of the caregivers recommended as his prospective adoptive parents. Even considering Father's renewed efforts at sobriety, the juvenile court did not

abuse its discretion in determining it would not be in Minor's best interests to modify the order denying reunification services to Father. (*In re Ernesto R., supra,* 230 Cal.App.4th at p. 224 [" 'Childhood does not wait for the parent to become adequate.' "].)

II.

The Sibling Relationship Exception to Adoption Does Not Apply

Under section 366.26, subdivision (c)(1), the court must terminate parental rights if it finds the child is likely to be adopted unless the parent establishes a statutory exception. Termination of parental rights is detrimental to the child if "[t]here would be substantial interference with a child's sibling relationship[.]" (§ 366.26, subd. (c)(1)(B)(v).) "[T]he 'sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 61; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014 [observing that "application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount."]

Father argues that making adoption the permanent plan for Minor puts Minor's relationship with his brother "at risk." Father claims the family that had cared for both Minor and his brother since August 2017 was not "likely to actually provide permanency for both children. This bonded relationship is one the juvenile court is likely to destroy [if] this court does not intervene. The bonded brothers should not be separated." The Department responds the record does not support Father's claims. We agree with the Department.

Father relies on the Department's adoption assessment, dated December 12, 2017, which stated that "[w]hile [Minor's] present caregivers provided an emergency home for [Minor] and his older half-sibling when their previous caregiver abruptly decided not to foster any longer, these caregivers have expressed interest in providing permanence to [Minor] but are not committed to his half-sibling. . . . It is the position of the Department that this family will be challenged to meet [Minor's] needs over time which includes placement with his older half-sibling."

However, in an addendum to the adoption assessment, dated December 18, 2017, the Department stated a meeting occurred three days earlier "to address and clarify the current caregivers' commitment and ability to provide permanence for both [Minor] and his older half-sibling over time." The result of the meeting was that the present caregivers were "committed to providing permanence through adoption for both children." The Department recommended they be identified as Minor's prospective adoptive parents. The addendum report noted Minor "makes good eye contact with both parents, seeks both parents for comfort and affection, interacts with his older half-sibling in a playful and energetic manner, and appears to be content and comfortable within the family." Thus, Father has not met his burden of establishing that termination of parental rights would interfere with Minor's sibling relationship.

III.

The Beneficial Relationship Exception to Adoption Does Not Apply

Father's final argument is that the juvenile court "erred in severing [Minor's] bonded and loving relationship with" Father. We are not persuaded.

To establish the beneficial relationship exception, Father must demonstrate he "maintained regular visitation and contact" with Minor, and that Minor "would benefit from continuing the relationship" with him. (§ 366.26, subd. (c)(1)(B)(i).) The juvenile court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The beneficial relationship exception is "difficult to make in the situation, such as the one here, where" Father has not "advanced beyond supervised visitation." (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.) The beneficial relationship exception "may be the most unsuccessfully litigated issue in the history of law. . . . [I]t is almost always a loser." (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other

grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413–414.) "We review a juvenile court's order on the beneficial-relationship exception for substantial evidence" but would reach the same result applying the abuse of discretion standard of review. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166 & fn. 7.)

Here, substantial evidence supported the juvenile court's determination that the beneficial relationship exception did not apply. Father contends he was involved in Minor's life until his incarceration and he made an active effort to visit with Minor since his release. The Department responds that Father's visits with Minor have been "sporadic at best."

We acknowledge Father's rehabilitation efforts made it logistically difficult for Father to visit with Minor. Nevertheless, Father fails to establish that severing his relationship with Minor "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) Minor was only 21 months old when this case commenced. At the disposition hearing, Father acknowledged his early visits with Minor were emotional and he missed six months of Minor's development due to his incarceration. As noted by the juvenile court at the time it terminated parental rights, Minor was still very young—only two years and eight months old—and "for a good portion of their life there has not been a father/child interaction."

By contrast, "over that same period of time [Minor has] been bonding with the current [prospective] adoptive parents." As explained in the Department's addendum, Minor "makes good eye contact with both [prospective adoptive] parents, seeks both parents for comfort and affection, . . . and appears to be content and comfortable within the family." This relationship was "nurturing. Both boys seek comfort from their prospective adoptive parents and . . . openly display their happiness through smiles, giggles and affection. They have acclimated in their prospective adoptive home and continue to make positive adjustments." Considering this evidence, we agree with the juvenile court that the beneficial relationship exception to adoption does not apply.

DISPOSITION

We affirm the order denying Father's section 388 petition and the order terminating Father's parental rights.

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Jones, P. J.

We concur:

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Simons, J.

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Needham, J.

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